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No. 94-141

In the Supreme Court of the United States

OCTOBER TERM, 1994

RANDALL A. TERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in appointing the Attorney General of the State of New York, who represented the State in obtaining a preliminary injunction against petitioner, to prosecute criminal contempt charges based on the allegation that petitioner had violated the injunction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 17 F.3d 575. The opinion of the district court denying petitioner's motion for recusal and finding the preliminary injunction constitutional (Pet. App. 13a-31a) is reported at 802 F. Supp. 1094. The district court's opinion denying petitioner's motion for disqualification (Pet. App. 32a-47a) is reported at 806 F. Supp. 490. The district court's opinion finding petitioner in criminal contempt (Pet. App. 48a-67a) is reported at 815 F. Supp. 728.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1994. A petition for rehearing was denied

on April 22, 1994. Pet. App. 80a. The petition for a writ of certiorari was filed on July 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted of criminal contempt, in violation of 18 U.S.C. 401(3). He was sentenced to five months' imprisonment. The court of appeals affirmed. Pet. App. 1a-10a.

1. On July 13, 1992, the State of New York, represented by Attorney General Robert Abrams, obtained a preliminary injunction in the United States District Court for the Southern District of New York forbidding petitioner, along with Operation Rescue National and other individuals, from "presenting or confronting either Governor Bill Clinton or Senator Albert Gore with any fetus or fetuses or fetal remains in the City of New York" during the Democratic National Convention.[1] Pet. App. 2a, 48a, 49a. On July 14, 1992, petitioner caused Harley David Belew to present then-Governor Clinton with a fetus in a plastic container in

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[1] That aspect of the preliminary injunction was based upon N.Y. Pub. Health Law § 4162 (McKinney 1985 & Supp. 1994), which governs "[t]he removal, transportation, burial or other disposition of remains resulting from a fetal death." See Gov't C.A. Br. 4 & n.4. The Attorney General of the State of New York is authorized to "bring an action for an injunction against any person who violates, disobeys or disregards any term or provision" of the Public Health Law. N.Y. Pub. Health Law § 12(5) (McKinney 1990). The injunction also required petitioner to "make good faith efforts to instruct all organizations and individuals * * * not to engage in the proscribed activities." Pet. App. 15a-16a. Petitioner was acquitted of violating that provision of the injunction. *Id.* at 64a-65a.

front of the Inter-Continental Hotel in New York City.[2] *Id.* at 54a-55a.

2. On July 15, 1992, the district court issued an order to show cause why petitioner should not be held in civil contempt for violating the preliminary injunction. At a contempt hearing on July 16, 1992, the district court noted that coercive civil contempt fines had failed to have any effect on petitioner's conduct and that criminal sanctions would be appropriate if it could be proved that petitioner had violated the preliminary injunction. The district court subsequently referred the matter to the United States Attorney for the Southern District of New York for possible prosecution of petitioner for criminal contempt. The United States Attorney declined to prosecute the alleged criminal contempt and instead suggested that the court appoint a private prosecutor. On August 5, 1992, the court, on its own initiative, inquired whether Attorney General Abrams would agree to prosecute petitioner for the alleged criminal contempt. Attorney General Abrams agreed, and the court appointed him to prosecute the criminal contempt. At the same hearing, the district court dismissed the civil contempt charges against petitioner initiated by its July 15 order to show cause. Pet. App. 33a-34a.

Petitioner moved to disqualify Attorney General Abrams from conducting the criminal contempt prose-

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[2] On several occasions prior to July 14, petitioner stated that he and his supporters planned to present Governor Clinton with a fetus. After Belew presented Governor Clinton with the fetus, petitioner admitted that he had "plott[ed]" to take that action (Pet. App. 62a), and he issued several statements taking credit for Belew's conduct. Relying on those statements, the district court found that petitioner had aided and abetted Belew's presentation of the fetus to Governor Clinton. *Id.* at 60a-64a.

cution. Pet. App. 34a. Petitioner asserted that Attorney General Abrams should be disqualified because he was involved in the underlying civil litigation and in civil contempt proceedings against other individuals arising from the July 13 injunction; because he stood to gain financially if the State of New York was awarded attorneys' fees as a prevailing party in the civil or criminal litigation; and because he harbored a personal animosity toward petitioner. In support of the last claim, petitioner filed declarations stating that Attorney General Abrams had taunted him at a pro-abortion rally on April 5, 1992, in Washington, D.C., by putting his fingers in his ears, sticking out his tongue, and telling petitioner, "[Y]ou are going to lose." In response, Attorney General Abrams filed affidavits from himself and his wife denying that he had engaged in those acts. *Id.* at 35a.

After a hearing, the district court denied petitioner's motion. At the outset, the court stated that the "central case" bearing on petitioner's motion was this Court's decision in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), which the district court construed to hold that "counsel for a party that is the beneficiary of a federal court order may not be appointed by a federal court to bring a charge of criminal contempt for an alleged violation of the underlying court order." Pet. App. 37a. In applying *Vuitton* to petitioner's motion, the court noted that Attorney General Abrams did not represent the interests of a private party but instead "occupies a position similar to that of the United States Attorney and is entitled to the same presumption of impartiality as a 'servant of the law.'" *Id.* at 39a. At the same time, the court acknowledged that "a sovereignty * * * might still face a conflict of interest in a prosecution for criminal contempt" and that "disqualifi-

cation is required when there is even the appearance of a conflict." *Ibid.*

The court rejected petitioner's claim that Attorney General Abrams should be disqualified because he had represented the State of New York in obtaining the July 13, 1992, preliminary injunction and had participated in civil contempt proceedings arising out of the alleged violation of that injunction. It found that because Attorney General Abrams was "not actively pursuing any claims in connection with the underlying civil litigation, there is not even the appearance that the prosecution for criminal contempt might be used for leverage in the underlying civil litigation or vice versa." Pet. App. 41a. In addition, the court noted, Attorney General Abrams could not derive an advantage in the civil litigation through his prosecution of the criminal contempt charges, because no grand jury had been convened to investigate the alleged criminal contempt, and Attorney General Abrams had at least as much ability to collect information under the Federal Rules of Civil Procedure as he did through discovery in a federal criminal case. *Ibid.*

The court further found that Attorney General Abrams' participation in the pending civil contempt proceedings did not raise a conflict of interest. Pet. App. 42a-43a. Because the purposes served by civil and criminal contempt are "convergent," the court held, there is no danger that a prosecutor handling related civil and criminal contempt proceedings will have to "serve two masters." *Id.* at 42a. In addition, the court noted that civil contempt proceedings against petitioner had been dismissed and that petitioner's counsel did not represent any of the defendants in the ongoing civil contempt proceedings. *Id.* at 43a.

The district court also rejected petitioner's claim that Attorney General Abrams stood to benefit financially from his prosecution of petitioner. The court noted that any fines imposed on petitioner would be paid into the federal treasury; that the court had already announced that it would not award attorneys' fees to the State of New York for its prosecution of the alleged civil or criminal contempt proceedings; and that any attorneys' fees and costs that might be awarded to New York in the underlying civil preliminary injunction litigation constituted "too remote" a benefit to require Attorney General Abrams' disqualification. Pet. App. 40a, 41a-42a, 43a.

The district court also rejected the contention that Attorney General Abrams should be disqualified because he had a personal animosity toward petitioner. Initially, the court found that neither petitioner nor Attorney General Abrams had established the truth of his version of the events of April 5, 1992. Taking petitioner's version as true, however, the court found that Attorney General Abrams' alleged actions on that day did not "demonstrate that Abrams harbors a personal animosity toward" petitioner. Pet. App. 45a. The court also rejected petitioner's contention that a television commercial broadcast by Attorney General Abrams during his campaign in the Democratic Senate primary showed his animosity toward petitioner. *Id.* at 45a-46a. Finally, the court held that "the undisputed fact that Abrams sought to obtain political gain from his prosecution of [petitioner] is not enough to disqualify him," because "[t]here is no evidence that potential political gain was the motivating force behind the Attorney General's decision to prosecute." *Id.* at 46a.

3. The court of appeals affirmed. Pet. App. 1a-10a. It agreed with the district court that this Court's decision

in *Vuitton* "focused on the danger of entrusting coercive powers of the state to counsel for a private litigant" and that "the Attorney General of the State of New York represents a sovereignty and is presumed to act with a sense of impartiality." *Id.* at 3a-4a. Although the court of appeals recognized the possibility that a government attorney could have a disabling conflict of interest, it held that "*Vuitton* does not automatically disqualify government attorneys who bring a civil action from serving as special prosecutors in a subsequent contempt proceeding[], and that where a case involves appointment of a government attorney, the court must examine the particular facts of the case to determine if reversible error has occurred." *Id.* at 5a.

The court of appeals' conclusion that Attorney General Abrams did not have "an actual or apparent conflict of interest" was based on four factors. Pet. App. 5a. First, the Attorney General's financial interest in the outcome of the underlying civil litigation was limited to the possibility that attorneys' fees might be awarded to the State, and was therefore "too remote to implicate a conflict." *Ibid.* Second, the Attorney General would not profit financially from the criminal contempt prosecution. Third, at the time of the criminal contempt prosecution, the civil contempt proceedings against petitioner had been dismissed. Finally, "at the time of the contempt prosecution there were no ongoing activities in the underlying civil action that could cloud the Attorney General's judgment in the criminal case or exert undue pressure on [petitioner]." *Ibid.*

The court of appeals also upheld the district court's finding that Attorney General Abrams did not harbor a personal bias against petitioner. Pet. App. 7a. The court agreed with the district court's conclusion that neither the alleged April 5, 1992, exchange between the Attorney

General and petitioner nor the Attorney General's campaign commercials constituted evidence of bias. Finally, the court noted that petitioner had failed to show that he suffered any prejudice as a result of the Attorney General's alleged animosity toward him. *Ibid.*[3]

ARGUMENT

Petitioner renews his contention that the district court's appointment of New York Attorney General Abrams to prosecute the criminal contempt charges against him contravened this Court's decision in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). The district court and the court of appeals correctly rejected that argument, and no other court of appeals has addressed the application of *Vuitton* to attorneys who represent a State. Further review is therefore unwarranted.

1. In *Vuitton*, private attorneys who had obtained an injunction against trademark infringement on behalf of a leather goods manufacturer were appointed to prosecute as a criminal contempt an alleged violation of the injunction. In assessing the propriety of the appointment, the Court first observed that a criminal prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at ~~all; and~~ whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." 481 U.S. at 803 (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935)). "Because of this

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[3] The court of appeals also rejected (Pet. App. 8a-10a) petitioner's claims that the preliminary injunction was unconstitutional and that it did not prohibit the activities giving rise to his conviction. Petitioner does not pursue those claims in this Court.

unique responsibility," the Court observed, federal prosecutors are subject to demanding conflict-of-interest provisions. 481 U.S. at 803-804. The duty of the private attorney, by contrast, is not to seek justice in a dispassionate fashion, but to demonstrate "unquestioned, continuing fidelity to the client." *Id.* at 804 (quoting *Brotherhood of Locomotive Firemen & Enginemen* v. *United States*, 411 F.2d 312, 319 (5th Cir. 1969)).

This Court concluded that the district court had "erred in appointing as prosecutors counsel for an interested party in the underlying civil [trademark infringement] litigation." 481 U.S. at 802. The Court reasoned that "[a] private attorney appointed to prosecute a criminal contempt * * * certainly should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* at 804. It noted, however, that "[t]he Government's interest is in dispassionate assessment of the propriety of [the] criminal charges," while "[t]he private party's interest is in obtaining the benefits of the court's order." *Id.* at 805. Those interests may not be "congruent," because counsel for a private party may be ethically required to pursue a prosecution that would be financially beneficial to the client or to abandon a prosecution if a lucrative settlement is offered. *Ibid.* For these reasons, the Court held that prosecution of a criminal contempt by counsel for an interested private party always carries the potential for a conflict of interest; it therefore concluded that counsel for an interested private party cannot discharge the "unique responsibility" (*id.* at 803) of the prosecutor to see that justice is done. Relying on its supervisory power, the Court accordingly held that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." *Id.* at 809.

Even where no conflict of interest is present, the Court recognized, "prosecutors may on occasion be overzealous and become overly committed to obtaining a conviction." 481 U.S. at 808 n.18. The Court drew a sharp distinction, however, between the "structural" problem created when the lawyer conducting a criminal prosecution represents a private party in a related matter, and the "personal" problem that exists when a prosecutor, for whatever reason, manifests bias or overzealousness. *Ibid.* Where the latter problem arises, the Court stated, "the courts deal with it on a case-by-case basis as an aberration." *Ibid.* (quoting *Polo Fashions, Inc.* v. *Stock Buyers Int'l, Inc.*, 760 F.2d 698, 705 (6th Cir. 1985), cert. denied, 482 U.S. 905 (1987)).

2. Petitioner asserts that the per se rule announced in *Vuitton* applies with the same force to a State's attorney general as to counsel for a private party. As petitioner points out, see Pet. 10-11, Attorney General Abrams represented the State of New York in both the underlying civil litigation and the civil contempt proceedings, while representing the United States in the criminal contempt prosecution. Petitioner observes that "[t]he interests of the State of New York and the United States are obviously not necessarily congruent, as illustrated by litigation between the two sovereigns." Pet. 11 (citing *New York* v. *United States*, 112 S. Ct. 2408 (1992)). Petitioner contends that "[*Vuitton*]'s bright-line test" therefore precluded the appointment of the New York Attorney General to conduct the criminal contempt prosecution. Pet. 11.

In our view, this argument lacks merit. As the court of appeals recognized, see Pet. App. 4a, the district court's appointment of a state attorney general to prosecute the criminal contempt charges against petitioner does not raise the same concerns as the appointment of counsel

for a private party. An attorney general is the representative of a sovereign and acts on behalf of the public interest. "[T]he attorney-general, in an action brought by him, represents the whole people and a public interest, and not mere individuals and private rights." *People* v. *Brooklyn, F. & C.I. Ry.*, 89 N.Y. 75, 93 (1882). Accord *State by Abrams* v. *New York City Conciliation & Appeals Bd.*, 472 N.Y.S.2d 839, 841 (Sup. Ct. 1984) ("when the state does bring suit, it must be for [the] redress of wrongs done to the interests of the people as a whole and not merely to vindicate the individual or private interests of certain citizens"); *People* v. *Lowe*, 22 N.E. 1016, 1020 (N.Y. 1889); *Farmland Dairies* v. *Commissioner of N.Y. Dep't of Agric.*, 847 F.2d 1038, 1044 (2d Cir. 1988). Cf. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 600-608 (1982) (State may file suit as *parens patriae* to vindicate its "quasi-sovereign" interest in protecting the well-being of its residents). In this case, Attorney General Abrams' duty in conducting the underlying civil litigation that produced the preliminary injunction was to vindicate the interests of the public, not to demonstrate "unquestioned, continuing fidelity" to a private party. *Vuitton*, 481 U.S. at 804. Thus, the principle upon which the *Vuitton* rule is based—that the conduct of a criminal prosecution may not be entrusted to an attorney who has pledged, in the same underlying matter, to protect the interests of a private client even at the expense of the public good—generally has no application to cases in which a state official is assigned to prosecute a criminal contempt.

This is not to say that the appointment of a state attorney general to conduct a criminal contempt prosecution will always be appropriate. The State of New York and the United States are different sovereigns, and cases will inevitably arise in which their interests

diverge. There may also be instances in which either the circumstances of the underlying litigation or the prior course of dealing between state officials and the alleged contemnor creates an unacceptable risk of bias or overzealousness. We do not believe, however, that either the frequency of such conflicts or the difficulty of identifying them on a case-by-case basis is so great as to justify a per se rule of disqualification.

3. At the time that the district court initiated criminal contempt proceedings against petitioner, there were two related civil actions pending in the district court. First, the civil action that resulted in the July 13, 1992, preliminary injunction against petitioner and others remained pending. Second, Attorney General Abrams represented the State of New York in civil contempt proceedings pending against other individuals and organizations who had allegedly violated the July 13 injunction. Although Attorney General Abrams represented the State of New York in both proceedings, his participation in those actions did not require him to accept obligations incompatible with his responsibility for conducting the criminal contempt prosecution.

First, the Attorney General's participation in concurrent civil and criminal contempt proceedings does not raise the concerns addressed in *Vuitton*. Both contempt proceedings sought vindication of the same injunction and thus involved congruent interests. Moreover, petitioner was not a party to the civil contempt proceedings, because the district court had dismissed those charges against petitioner at the time that it initiated criminal contempt proceedings against him. See Pet. App. 5a, 34a.

Nor did the conduct of the underlying civil litigation require Attorney General Abrams to accept obligations incompatible with his role as public prosecutor.

Attorney General Abrams sought the preliminary injunction to ensure order and public safety during an important public event in New York City. He thereby sought to vindicate the State's interest in the protection of its residents and the enforcement of public laws, an interest entirely consistent with that of the United States and its citizens in obtaining compliance with the orders of its courts.[4]

Finally, there was no danger that the Attorney General could obtain any improper benefit in the civil actions by prosecuting the criminal contempt. Because no grand jury was empaneled, Attorney General Abrams could not use the criminal prosecution to further the State's gathering of information for the civil actions. As a party to a civil action in federal court, Attorney General Abrams could obtain at least as much information through civil discovery as he could acquire pursuant to his conduct of the criminal contempt prosecution. See Pet. App. 5a.[5]

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[4] Different concerns might be raised if the underlying civil litigation had involved, for example, the State's operation of a commercial enterprise. In that setting the interests of the State as an institution might more plausibly be distinguished from those of the public, and the role of the Attorney General could more readily be analogized to that of counsel for a private entity. Cf. *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601 (distinguishing between State's "sovereign" and "proprietary" interests, and noting that "[a]s a proprietor, [a State] is likely to have the same interests as other similarly situated proprietors.").

[5] In support of his claim that Attorney General Abrams had an impermissible conflict of interest, petitioner notes (Pet. 7) that evidence introduced at the criminal trial, including copies of petitioner's radio broadcasts and the depositions of two individuals, "was * * * obtained through civil discovery in the underlying action." But Attorney General Abrams (or any other attorney appointed to conduct the criminal contempt prosecution) could

4. In the courts below, petitioner contended that Attorney General Abrams harbored a personal bias against him, and that Attorney General Abrams' appointment to prosecute the criminal contempt was therefore improper. See Pet. App. 7a, 44a-46a. Although the petition summarizes the testimony underlying that contention, see Pet. 6-7, petitioner appears to have abandoned that factbound claim in this Court. In any event, as the court of appeals recognized (Pet. App. 7a), *Vuitton* has no bearing on the question whether Attorney General Abrams' alleged personal animosity toward petitioner required his disqualification. *Vuitton* addresses only the "structural" problem caused by the appointment of a prosecutor whose representation of a private interest raises the risk of a conflict of interest; it does not address the "personal" problem of prosecutors who are "overzealous and become overly committed to obtaining a conviction." See *Vuitton*, 481 U.S. at 808 n.18.

5. Petitioner identifies no decision that has applied this Court's analysis in *Vuitton* to attorneys who represent a State. He contends (Pet. 12-15), however, that the court of appeals' decision conflicts with decisions of several other courts of appeals. In particular, petitioner asserts that the courts in *FTC* v. *American Nat'l Cellular*, 868 F.2d 315 (9th Cir. 1989), and *United States ex rel. SEC* v. *Carter*, 907 F.2d 484 (5th Cir. 1990), "have ruled that [*Vuitton*] applies to government attorneys." Pet. 12. Contrary to peti-

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have used a criminal subpoena to obtain the broadcasts and to compel the testimony at trial of the two individuals. Indeed, the Attorney General was prepared to call the two individuals as witnesses at trial, but petitioner stipulated to the admission of their civil deposition transcripts. Pet. App. 6a.

tioner's contention, both of those decisions are consistent with the Second Circuit's holding in the instant case.

In *American Nat'l Cellular* and *Carter*, the question was whether attorneys for a federal government agency could be appointed to prosecute as a criminal contempt a violation of a court order obtained by the agency in civil litigation. In both cases, the courts of appeals found that *Vuitton* did not dictate the answer to that question.[6] See *American Nat'l Cellular*, 868 F.2d at 319 ("We doubt the Supreme Court intended *Vuitton* to disqualify automatically any FTC attorney as 'interested' simply by virtue of employment with the agency that brought the underlying suit."); *Carter*, 907 F.2d at 486 (*Vuitton* "does not precisely control [this] case"). Instead, in each case the court examined the circumstances surrounding the appointment of the federal attorney to prosecute the criminal contempt and the conduct of the attorneys during that prosecution to determine whether the agency attorneys had "an extraneous interest * * * that may create 'the *appearance* of impropriety.'" *Carter*, 907 F.2d at 486; see *American Nat'l Cellular*, 868 F.2d at 319 (inquiring whether FTC attorneys "lack

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[6] That conclusion was surely correct. The principle that a prosecutor may not simultaneously represent the government in a criminal proceeding and a private client with potentially divergent civil interests clearly has no application to federal attorneys, whose "client" in both civil and criminal proceedings is the United States government. See *American Nat'l Cellular*, 868 F.2d at 319 ("The *Vuitton* opinion focused quite narrowly on the conflicts of interest faced by private attorneys trying to represent simultaneously both their private clients' interests and the public interest in prosecuting contemnors.").

the impartiality and appearance of impartiality that our system of justice demands of its prosecutors").[7]

Contrary to petitioner's assertion (Pet. 13), therefore, *Carter* does not stand for the broad proposition that "a government prosecutor cannot conduct parallel civil and criminal proceedings without running afoul of [*Vuitton*]."[8] Instead, the *Carter* court concluded that the facts and circumstances of the particular case "raise[d] serious doubt about the SEC's ability in this case to perform disinterestedly the duties of a special prosecutor." 907 F.2d at 487. In support of that conclusion, the court noted that the SEC attorneys remained "locked in an on-going civil struggle" with the defendant during the criminal prosecution and that the SEC had made misrepresentations in its brief on appeal

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[7] Petitioner also argues (Pet. 14) that because the Ninth Circuit in *American Nat'l Cellular* relied on two factors that are not present in this case, its approach conflicts with the analysis of the court of appeals here. That contention is without merit. Although petitioner correctly states that the Ninth Circuit focused on two factors—the involvement of the United States Attorney and the fact that different FTC attorneys prosecuted the contempt and conducted the underlying civil litigation—the court did not suggest that other factors would not be relevant in another case.

[8] To the contrary, this Court's decision in *United States* v. *John Doe, Inc. I*, 481 U.S. 102 (1987), which held that an Antitrust Division lawyer who had conducted a grand jury investigation could continue to use grand jury materials during subsequent civil proceedings, clearly presumes that a federal attorney may legitimately participate in civil and criminal proceedings involving the same potential defendants and arising from the same underlying events. See also *United States* v. *Wencke*, 604 F.2d 607, 611 (9th Cir. 1979); *United States* v. *Birdman*, 602 F.2d 547, 561-563 (3d Cir. 1979), cert. denied, 444 U.S. 1032 and 445 U.S. 906 (1980). There is no reason why a different rule should apply to prosecutions for criminal contempt.

of the criminal conviction. *Id.* at 486-487. Rather than treating the participation of the SEC attorneys in both civil and criminal proceedings as a "structural" violation subject to a per se bar, the *Carter* court thus addressed the attorneys' apparent overzealousness "on a case-by-case basis as an aberration." *Vuitton*, 481 U.S. at 808 n.18. The court of appeals here took a similar approach, inquiring whether the Attorney General had a financial or other interest that created an actual or potential impediment to his disinterested conduct of the prosecution.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1994

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[9] Petitioner also alleges (Pet. 12-13) a conflict between the court of appeals' decision and several other cases. The decisions on which he relies, however, simply restate the general rule announced in *Vuitton* that appointment of counsel for an interested party to conduct a prosecution for criminal contempt requires reversal of a resulting conviction. None of those cases involves attorneys representing a State, and the decisions do not address the question whether a per se bar applies to state government attorneys who have participated in the litigation from which the alleged contempt arises.